

## **Rule 7, Ariz. R. Crim. P.**

### **BAIL AND BOND — Bond forfeiture, Rule 7.6(c)(2), Arizona Rules of Criminal Procedure — If a defendant fails to show good cause for his failure to appear, Rule 7.6(c)(2) requires forfeiture**

**Revised 12/2009**

Rule 7.6(c)(2), Arizona Rules of Criminal Procedure, states:

If at the hearing, the violation is not explained or excused, the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond, which shall be enforceable by the state as any civil judgment.

Although the rule uses the permissive “may,” case law states that if the defendant fails to justify his failure to appear, the trial court must forfeit the bond. In *State ex rel. Corbin v. Superior Court*, 2 Ariz. App. 262, 264, 407 P.2d 943, 945 (App. 1965), the court of appeals stated:

When it is established that there has been not only a breach [of the defendant’s duty to appear] but that there is an absence of “reasonable cause” the trial court loses its judicial discretion for it then becomes the obligation of the court amounting almost to a ministerial duty, to enter the appropriate order of forfeiture.

The trial court may not condition the forfeiture on the bond company’s further efforts to bring the defendant to court. In *State ex rel. Berger v. Marquardt*, 111 Ariz. 413, 531 P.2d 536 (1975), a bond company posted bail for a defendant who failed to appear. At the bond revocation hearing, the company offered no excuse for the defendant’s failure to appear. Nevertheless, instead of forfeiting the bond, the trial court ordered the company to deposit a check for the bond amount payable to the clerk of the court and ordered the clerk to hold the check until further notice, allowing the bond company to make additional efforts to find the defendant and bring him to court. The Arizona Supreme Court disapproved this procedure:

The only discretion vested in the trial court relates to 1) determining whether there is an explanation or excuse for the defendant's absence and 2) the amount of judgment to be entered if the violation is not explained or excused.

No authority is granted to condition a judgment upon further efforts to locate a defendant, nor is authority given, in effect, to suspend a judgment and thus thwart the prosecutor's right to enforce a forfeiture as any civil judgment. The Respondent judge was in error in holding that he had inherent authority to retain control over the bond. This Court has defined the limits of the trial judge's authority over bail bonds in specific terms within the criminal rules. With the authority of the trial judge defined, his only duty is to follow the rules.

The limit of the court's discretion is clear. Either the judge accepts the explanation for the absence and declines to enter judgment or he finds no excuse and enters an appropriate order of forfeiture as to all or part of the bond.

*State ex rel. Berger v. Marquardt*, 111 Ariz. at 414-15, 531 P.2d at 537-38. In *State v. Rogers*, 117 Ariz. 258, 261, 571 P.2d. 1054, 1057 (App. 1977), *superseded by statute as noted in State v. Old West Bonding Company*, 203 Ariz. 468, 473, 56 P.3d 42 (App. 2002), the court of appeals, citing *State ex rel. Berger v. Marquardt, supra*, held, “[O]nce the court has determined that there was no justification for the defendant’s non-appearance and no reasonable cause has been shown for reduction of the bond, the court has no discretion other than to forfeit the bond in its entirety.”

When the defendant fails to appear, the burden is on the defendant or the bonding company to show an excuse or explanation for the violation by a preponderance of the evidence. *State v. Martinez-Gonzales*, 145 Ariz. 300, 302, 701 P.2d 8, 10 (App. 1985). The “preponderance” standard applies because the bond forfeiture proceeding is civil in nature. *Id.* at 302, 701 P.2d at 10.

Note that the court will issue a bench warrant for the released defendant's arrest

if he violates any condition of his appearance bond, even if that violation is not itself a crime (for example, if the defendant violates the conditions of his bond by leaving the jurisdiction (*Id. at 30*)), and even if the violation is not willful (for example, if the defendant fails to appear because he is mentally incompetent). See *State v. Veatch*, 132 Ariz. 394, 646 P.2d 279 (1982). “The element of willfulness is involved only if additional sanctions such as contempt are applied by the court. It is not an element in the determination of forfeiture.” *Id. at 397*, 646 P.2d at 282.

Under old caselaw, rules and statutes, a defendant did not show “reasonable cause” for failing to appear on bond by showing that he had failed to appear because he was arrested and detained elsewhere for crimes committed after his release on bond. However, under Rule 7.6(d)(2), Arizona Rules of Criminal Procedure, a surety may now have the bond exonerated by showing that the defendant is in custody elsewhere on the date he was supposed to appear. In one old case, *State ex rel. Ronan v. Superior Court*, 96 Ariz. 229, 393 P.2d 919 (1964), the defendant was released on bond pending his preliminary hearing in justice court. Before his hearing date, the defendant was arrested by the FBI and detained outside Arizona. He failed to appear for his preliminary hearing and the justice court ordered his bond forfeited. The bond company moved to vacate the forfeiture order, arguing that the defendant’s arrest and incarceration outside the state made it impossible for him to surrender himself and was thus reasonable cause for his nonappearance in justice court. The trial court vacated the forfeiture order and the State sought review. The Arizona Supreme Court found that the defendant had not shown reasonable grounds for his failure to appear:

While there are circumstances, which when proved, would

be valid grounds for vacating the judgment of forfeiture, this is clearly not one of them.

There being no reasonable cause shown, within the contemplation of [former] Rule 74 [now Rule 7.6], the superior court was without jurisdiction to vacate, modify or suspend the judgment of forfeiture. Until such a showing was made the court was powerless to exercise its discretion.

*State ex rel. Ronan v. Superior Court*, 96 Ariz. at 233, 393 P.2d at 921, citations omitted. Thus, under the Rules of Criminal Procedure as they then provided, the trial court erred in vacating the forfeiture order. *Accord*, *State ex rel. Corbin v. Superior Court*, 2 Ariz. App. 257, 261, 407 P.2d 938, 942 (App. 1965). However, Rule 7.6(d)(2) now provides that the trial court may exonerate the bond if the surety either surrenders the defendant to the sheriff of the county where the case is being prosecuted “in compliance with the requirements of A.R.S. § 13-3974” or if the surety “delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court.” See *State v. Old West Bonding Company*, 203 Ariz. 468, 474, 56 P.3d 42, 48 (App. 2002) (explaining that Rules 7.6(c)(2) and 7.6(d) should be read together to give the court discretion and listing a number of factors that courts should consider).